MASSACHUSETTS COALITION FOR THE HOMELESS & OTHERS[1] VS. CITY OF FALL RIVER & OTHERS[2]

Docket:	SJC-12914
Dates:	November 2, 2020 - December 15, 2020
Present:	Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[3]
County:	Suffolk
Keywords:	Constitutional Law, Freedom of speech and press. Statute, Severability. Practice, Civil, Declaratory proceeding.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on June 21, 2019.

The case was reported by Cypher, J.

Ruth A. Bourquin for the plaintiffs.

Timothy J. Casey, Assistant Attorney General, for district attorney for the Bristol district.

Gary P. Howayeck, Assistant Corporation Counsel, for city of Fall River & another, submitted a brief.

Rajan Bal, of the District of Columbia, Eric S. Tars, of Pennsylvania, Andrew Nathanson, Susan M. Finegan, Emily Kanstroom Musgrave, Courtney Herndon, & Nana Liu, for National Homelessness Law Center, amicus curiae, submitted a brief.

LENK, J. Under G. L. c. 85, § 17A, sometimes referred to as the "panhandling" statute, a person who signals to a motor vehicle on a public way, causes the vehicle to stop, or accosts an occupant of the vehicle "for the purpose of soliciting any alms, contribution or subscription or of selling any merchandise" is generally subject to criminal prosecution and a fine. The statute permits the same conduct when undertaken for other purposes, however, such as selling newspapers, and it specifically exempts activity that would otherwise fall within the statute's sweep if conducted by a nonprofit organization with a permit from the local chief of police. We conclude that G. L. c. 85, § 17A, is unconstitutional on its face under the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution, because the statute is a content-based regulation of protected speech in a public forum that cannot withstand strict scrutiny.[4]

1. Background. Plaintiffs John Correira and Joseph Treeful are low income residents of the city of Fall River who are currently homeless; they are both members of the Massachusetts Coalition for the Homeless, an organization that provides social services and advocates on behalf of homeless individuals and families (collectively, the plaintiffs).[5] In order to provide for their basic needs, Correira and Treeful sometimes stand by the side of public streets in Fall River with signs indicating that they are homeless, and they accept donations from passing motorists. They have done so in the past and intend to do so in the future.

During 2018 and 2019, Fall River police initiated a combined total of over forty criminal complaints against the two men, charging them with violation of G. L. c. 85, § 17A.[6] Both men have been incarcerated as the result of such charges: Correira, for failing to respond to a summons on one of the complaints, and Treeful, for violating his probation on other charges by, allegedly, violating § 17A.

The plaintiffs commenced this action in the Superior Court against Fall River, its chief of police, several individual police officers, and the district attorney for the Bristol district, seeking declaratory and injunctive relief on the ground that G. L. c. 85, § 17A, violates their right to free speech under the State and Federal Constitutions. The plaintiffs also asserted violations of the Massachusetts Civil Rights Act (MCRA), G. L. c. 12, § 11I, by the individual defendants.

Shortly thereafter, the plaintiffs filed a motion for a preliminary injunction to halt the enforcement of G. L. c. 85, § 17A. The district attorney voluntarily agreed not to enforce the statute during the pendency of the litigation, and after a hearing, the Superior Court judge issued a preliminary injunction as to the remaining defendants, enjoining enforcement of the statute.

The district attorney subsequently conceded that G. L. c. 85, § 17A, is unconstitutional insofar as it authorizes imposition of a fine for signaling, stopping, or accosting a motor vehicle or its occupants on a public way if undertaken for the purpose of panhandling, while exempting the same conduct if undertaken for the purpose of selling newspapers or raising money for a nonprofit organization. He filed a notice of consent to the entry of a declaratory judgment in favor of the plaintiffs on the first count of the complaint.

In response, the plaintiffs voluntarily dismissed their claims against the individual defendants for damages under the MCRA and joined with Fall River and the chief of police in filing a petition in the county court to have the declaratory judgment claim transferred there and then reserved and reported to the full court. The district attorney opposed the transfer, in part based on doubts that the case presented the requisite adversity for adjudication of a constitutional question.

After a hearing, a single justice of this court granted the petition for transfer and reserved and reported the case to the full court. The case before us consists of a single claim for a declaration that G. L. c. 85, § 17A, is unconstitutional on its face under the First Amendment and art. 16. As

noted above, the district attorney concedes that the statute is unconstitutional, but disagrees with the plaintiffs as to the appropriate scope of the declaration. Fall River and the chief of police defend the constitutionality of the statute.

2. Discussion. "The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.'" Reed v. Gilbert, 576 U.S. 155, 163 (2015). Article 16 of our Declaration of Rights provides analogous protections and, in some instances, provides more protection for expressive activity than the First Amendment. See, e.g., Mendoza v. Licensing Bd. of Fall River, 444 Mass. 188, 201 (2005) (holding that art. 16 provides more protection for nude dancing than does First Amendment). Here, G. L. c. 85, § 17A, violates both the First Amendment and art. 16.

Some aspects of the First Amendment analysis require little discussion. First, "[i]t is beyond question that soliciting contributions is expressive activity that is protected by the First Amendment." Benefit v. Cambridge, 424 Mass. 918, 922 (1997). See United States v. Kokinda, 497 U.S. 720, 725 (1990), citing Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 629 (1980) ("Solicitation is a recognized form of speech protected by the First Amendment"); Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 788-789 (1988). In Benefit, this court specifically held "that there is no distinction of constitutional dimension between soliciting funds for oneself and for charities," and therefore, "peaceful begging constitutes communicative activity protected by the First Amendment." Benefit, supra at 923.[7]

Second, it is well settled that the State's "public way[s]" are "traditional public fora" for purposes of the First Amendment (citations omitted). McCullen v. Coakley, 573 U.S. 464, 476 (2014). See Frisby v. Schultz, 487 U.S. 474, 481 (1988) ("No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora").

As this court observed in Benefit, "[t]he streets and public areas are quintessential public forums, not because they are a particularly convenient platform for expression, but because they are the necessary, essential public spaces that connect our individual private spaces, from which we may exclude others and likewise be excluded, but from which we almost all must inevitably emerge from time to time." Benefit, 424 Mass. at 926-927. And although assertions that peaceful begging or other forms of solicitation on public ways create a safety hazard may be relevant to the question whether a government regulation of such activity ultimately passes constitutional muster, such assertions "do not deprive public streets of their status as public fora." McCraw v. Oklahoma City, 973 F.3d 1057, 1068 (10th Cir. 2020).

Third, it is indisputable that G. L. c. 85, § 17A, in its current form is a content-based regulation subject to strict scrutiny. The United States Supreme Court has held that "[g]overnment regulation of speech is content based if a law applies to particular speech because

of the topic discussed or the idea or message expressed." Reed, 576 U.S. at 163. "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." Id. at 163-164.

Here, G. L. c. 85, § 17A, is content based on its face because its restrictions "depend entirely on the communicative content" of the activity it regulates. Reed, 576 U.S. at 164-165. More specifically, the conduct described in the statute (signaling to a vehicle, causing it to stop, or accosting one of its occupants) is only proscribed if it is done "for the purpose of soliciting any alms, contribution or subscription or of selling any merchandise" (emphasis added). G. L. c. 85, § 17A. The statute purports to carve out specific exemptions for the same conduct, however, when it is performed for other enumerated purposes, including selling newspapers and soliciting contributions on behalf of permitted nonprofit organizations.[8] We need go no further to conclude that the statute is content based for purposes of a First Amendment analysis. See Benefit, 424 Mass. at 924 (holding that statute was content based on its face where it prohibited "communicative activity that asks for direct, charitable aid," while permitting similar activity by those who sought money "for other purposes"). See also Thayer v. Worcester, 144 F. Supp. 3d 218, 233-234 (D. Mass. 2015) (gathering cases and concluding that ordinance banning "aggressive" panhandling was content based); McLaughlin v. Lowell, 140 F. Supp. 3d 177, 185 (D. Mass. 2015) (observing that "Reed makes earlier cases, which had split over what forms of regulation of panhandling were content-based, of limited continuing relevance").

Because we conclude that G. L. c. 85, § 17A, is a content-based regulation of protected speech, strict scrutiny applies. See Reed, 576 U.S. at 163-164.[9] Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest" (citation omitted). Id. at 171. Here, the parties do not dispute that the State's interest in protecting public safety on its public ways is a compelling one. We therefore turn to whether the statute is narrowly tailored to serve the asserted interest.

In the context of strict scrutiny, a regulation is not narrowly tailored unless "it chooses the least restrictive means to further the articulated interest." Sable Communications of Cal., Inc. v. Federal Communications Comm'n, 492 U.S. 115, 126 (1989) (Sable). See Bulldog Investors Gen. Partnership v. Secretary of the Commonwealth, 460 Mass. 647, 661 n.10 (2011), cert. denied, 566 U.S. 987 (2012), citing Sable, supra ("[T]he content of noncommercial speech is fully protected under the First Amendment to the United States Constitution and may be regulated by the government only where such regulation is the least restrictive means to further a compelling State interest").

Here, the plaintiffs and the district attorney both agree that the statute is not narrowly tailored. The plaintiffs contend that the statute is simultaneously overinclusive (because it reaches expressive conduct that does not pose a threat to public safety) and underinclusive (because it uses content-based distinctions to exempt conduct that just as easily could pose a threat to public safety). The district attorney agrees that the statute is underinclusive, but, at least in his principal brief, he did not address the issue of overinclusiveness.[10] Fall River and the chief of police, on the other hand, urge us to uphold the statute as narrowly tailored, based largely on their assertions that the statute is enforced only against individuals who "actively signal or otherwise [a]ccost a stopped or moving vehicle, thereby impeding and obstructing the flow of traffic." We agree with the plaintiffs and the district attorney that the statute's content-based distinctions and exemptions render it unconstitutional.[11]

"While surprising at first glance, the notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles." Ladue v. Gilleo, 512 U.S. 43, 51 (1994). This is so because "an exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people" (quotation and citation omitted). Id. "Underinclusiveness can also reveal that a law does not actually advance a compelling interest." Williams-Yulee v. Florida Bar, 575 U.S. 433, 449 (2015).

Here, there can be little doubt that signaling to, stopping, or accosting motor vehicles for the purpose of soliciting donations on one's own behalf poses no greater threat to traffic safety than engaging in the same conduct for other nonprohibited or exempted purposes, such as gathering signatures for a petition, flagging down a taxicab, selling newspapers, or soliciting donations for a nonprofit organization. Because G. L. c. 85, § 17A, fails to prohibit "vast swaths of conduct that similarly diminish[] its asserted interest[]" in traffic safety, we conclude that the statute is not narrowly tailored to serve that interest. See Williams-Yulee, 575 U.S. at 448, citing Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 543-547 (1993). See also Reed, 576 U.S. at 171-172 (ordinance limiting placement of "temporary directional signs" was "hopelessly underinclusive" where town had not shown that limiting such signs was necessary to further interest in traffic safety, while limiting other types of signs was not); McCraw, 973 F.3d at 1063, 1077 (ordinance banning sitting, standing, or remaining on certain medians, but exempting government employees and individuals using medians while crossing street, performing "legally authorized work," or responding to emergencies, was not narrowly tailored under more relaxed standard for content-neutral time, place, and manner restrictions); Rodgers v. Bryant, 942 F.3d 451, 457 (8th Cir. 2019) (anti-loitering law that applied only to charitable solicitation, and not political, commercial, or other types of solicitation, was underinclusive and consequently not narrowly tailored under strict scrutiny).

As a means of ensuring traffic safety, the statute is also "significantly overinclusive." See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 121 (1991). First, the statute applies to all public ways, regardless of whether the characteristics of a particular street are such that the plaintiff's expressive activity would pose a safety risk. Second, the statute broadly prohibits signaling to, stopping, or accosting a motor vehicle for the enumerated purposes without regard to whether those activities are performed in a manner that in fact poses a risk to public safety. See McLaughlin, 140 F. Supp. 3d at 190 n.9 (noting that ordinance prohibiting "a panhandler who never raised her voice or lifted a hand" from soliciting donations "is not narrowly tailored to the goal of public safety, much less the least restrictive means available to achieve that goal"). As the plaintiffs point out, actual interference with traffic is not even an element of a violation of G. L. c. 85, § 17A. Rather, merely sitting by the side of the road holding a sign that states "I am homeless, please help" could trigger criminal prosecution under the statute. The fact that Fall River professes to enforce the statute much more narrowly than a "more natural reading" of its language would permit merely highlights the fact that, on its face, the statute reaches far more broadly than necessary to achieve the government's stated purpose. See United States v. Stevens, 559 U.S. 460, 480 (2010). In sum, because G. L. c. 85, § 17A, is both over- and underinclusive with respect to the purpose it is intended to serve, it is not narrowly tailored, and it cannot withstand strict scrutiny.

The question of remedy remains. The plaintiffs seek a declaration that G. L. c. 85, § 17A, is facially invalid in its entirety. The district attorney, on the other hand, suggests that the statute may be saved by invalidating it only insofar as it prohibits the "soliciting [of] any alms" from occupants of motor vehicles on public ways. In addition to these two possibilities, we also have considered whether excising some combination, or even all, of the statute's content-based distinctions and exemptions would provide an appropriate remedy. See G. L. c. 4, § 6, Eleventh ("The provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof"); Commonwealth v. Chou, 433 Mass. 229, 238 (2001), quoting Commonwealth v. Petranich, 183 Mass. 217, 220 (1903) ("where a statutory provision is unconstitutional, if it is in its nature separable from other parts of the statute, so that they may well stand independently of it, and if there is no such connection between the valid and the invalid parts that the Legislature would not be expected to enact the valid part without the other, the statute will be held good, except in that part which is in conflict with the Constitution"). Ultimately, we agree with the plaintiffs that the statute's constitutional infirmities are too pervasive to be remedied through partial invalidation or severance.

We turn first to the district attorney's suggestion that we simply invalidate that portion of the statute that prohibits the "soliciting [of] any alms." First, such a solution falls short of removing

even these plaintiffs' protected conduct from the statute's reach, where the statute would still prohibit the "soliciting [of] . . . contribution[s]," which arguably would include holding up a sign that encouraged donations from passing motorists. Second, even if we were to adopt a modified version of the district attorney's approach, invalidating the statute insofar as it reached any solicitation of "alms" or "contribution[s]" not involving a commercial exchange, this would not cure the statute's constitutional deficiencies because the statute likely would still have a substantial chilling effect on protected noncommercial speech.

The plaintiffs' allegations of overinclusiveness, and the doctrine of "overbreadth," are relevant here. In contrast to the general rule that a facial challenge can succeed only if a statute is unconstitutional in all of its applications, "[i]n the First Amendment context, . . . [the United States Supreme Court] recognizes a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep" (quotations and citation omitted). Stevens, 559 U.S. at 473. Overbreadth sometimes has been described as "an exception to the general principle that litigants only have standing to assert their own rights and not the rights of others; in the free speech context, such challenges have been permitted in order 'to prevent [a] statute from chilling the First Amendment rights of other parties not before the court.'" Bulldog Investors Gen. Partnership, 460 Mass. at 676, quoting Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 958 (1984).

These principles also are relevant to determining the appropriate remedy in this case because, although the proposed narrowing of the statute would remove the plaintiffs' conduct from its reach, the plaintiffs argue (and they have standing to argue) that the remaining provisions would continue to have an unconstitutional chilling effect on protected speech. See Stevens, 559 U.S. at 484-485 (Alito, J., dissenting), quoting United States v. Williams, 553 U.S. 285, 292 (2008) (overbreadth doctrine "seeks to balance the 'harmful effects' of 'invalidating a law that in some of its applications is perfectly constitutional' against the possibility that 'the threat of enforcement of an overbroad law [will] dete[r] people from engaging in constitutionally protected speech'").[12]

We see an unacceptable risk of a chilling effect here. The line between a noncommercial solicitation of a donation and the "selling [of] any merchandise" (which, under this hypothetical remedy, would continue to be prohibited by the statute) can be a slippery one. Imagine that a police officer sees an individual step out into the roadway, accept money from a motorist, and then hand the motorist a rose. Will enforcement turn on whether the officer perceives the exchange as a sale of the rose or the giving of a small token in thanks for the donation of money? We see little in that distinction to guide law enforcement or to give comfort to those engaged in the protected activity of seeking donations for personal support that their activity would not result in criminal prosecution. In short, we are of the view that the district attorney's

proposed remedy would produce a statute that is still likely to deter a substantial amount of protected, noncommercial speech.

The statute's underinclusiveness presents a different problem. In the abstract, a natural cure for underinclusiveness would be to sever the statute's content-based distinctions and exemptions. The United States Supreme Court took this approach in the recent case of Barr v. American Ass'n of Political Consultants, Inc., 140 S. Ct. 2335 (2020). There, six Justices concluded that a 2015 amendment to the Telephone Consumer Protection Act of 1991, which exempted so-called "robocalls" made to collect debts owed to or guaranteed by the Federal government from the statute's general ban on such calls, "impermissibly favored debt collection speech over political and other speech, in violation of the First Amendment." Id. at 2343. Seven Justices concluded that the proper remedy was to invalidate and sever the exception contained in the 2015 amendment, rather than to invalidate the entire statute. Id. Significantly, a plurality observed that the exception at issue was "only a slice of the overall robocall landscape," and that it was "not a case where a restriction on speech is littered with exceptions that substantially negate the restriction." Id. at 2348 (distinguishing Gilleo, 512 U.S. at 52).

By contrast, in Gilleo, 512 U.S. at 46, the Court was faced with an ordinance that prohibited homeowners from displaying any signs on their properties, except those that fell within one of ten exemptions, including content-based exemptions for "residential identification signs," "for sale" signs, signs "for churches, religious institutions, and schools," and "[c]ommercial signs in commercially zoned or industrial zoned districts." The Court dismissed the possibility that Fall River could "remove the defects in its ordinance by simply repealing all of the exemptions," and noted that where "the ordinance is also vulnerable because it prohibits too much speech, that solution would not save it." Id. at 53.

Here, G. L. c. 85, § 17A, more closely resembles the exemption-ridden sign ordinance struck down in Gilleo, 512 U.S. at 52, than the statute only partially invalidated in American Ass'n of Political Consultants, Inc., 140 S. Ct. at 2348. Purged of all of its content-based restrictions and exemptions, what remains of § 17A "almost completely [would] foreclose[] a venerable means of communication" of protected speech, Gilleo, supra at 54, not only the peaceful begging in which the plaintiffs engage, but any form of speech that accompanied the prohibited conduct of signaling to, stopping, or accosting a motor vehicle, including the political and social discourse that lies at the core of the First Amendment. We discern no indication that such an extreme result would be consistent with legislative intent. To the contrary, since the statute was originally enacted in 1930, see St. 1930, c. 139, the Legislature has amended it over the years to permit increasingly more speech.[13] Unfortunately, the Legislature has done so in a way that employs content-based distinctions that are not narrowly tailored to achieving its stated interest in traffic safety.

We therefore conclude that G. L. c. 85, § 17A, as currently written, must be invalidated in its entirety as violative of the First Amendment and art. 16. This conclusion in no way precludes the Legislature from amending the statute or from enacting another statute aimed at protecting public safety on or near public roadways, but it must do so in a way that does not impermissibly burden protected speech.

3. Conclusion. We conclude that G. L. c. 85, § 17A, is unconstitutional on its face under the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights, and we remand the case to the county court for the entry of a declaratory judgment to that effect.

So ordered.

footnotes

[1] John Correira and Joseph Treeful.

[2] District attorney for the Bristol district and chief of police of Fall River.

[3] Justice Lenk participated in the deliberation on this case and authored this opinion prior to her retirement.

[4] We acknowledge the amicus brief submitted by the National Homelessness Law Center.

[5] We take our facts primarily from the statement of agreed-upon material facts filed by the plaintiffs and two of the defendants, the city of Fall River and its chief of police, in support of their motion to transfer the case to the county court. The district attorney did not join in the motion or in the statement of agreed-upon material facts, but conceded that the statute is unconstitutional insofar as it prohibits the "soliciting [of] any alms" from occupants of motor vehicles on public ways and that declaratory judgment should enter in favor of the plaintiffs. As discussed infra, the district attorney has expressed disagreement with the plaintiffs only as to the scope of the proposed declaration.

[6] General Laws c. 85, § 17A, provides:

"Whoever, for the purpose of soliciting any alms, contribution or subscription or of selling any merchandise, except newspapers, or ticket of admission to any game, show, exhibition, fair, ball, entertainment or public gathering, signals a moving vehicle on any public way or causes the stopping of a vehicle thereon, or accosts any occupant of a vehicle stopped thereon at the direction of a police officer or signal man, or of a signal or device for regulating traffic, shall be punished by a fine of not more than fifty dollars. Whoever sells or offers for sale any item except newspapers within the limits of a state highway boundary without a permit issued by the department shall for the first offense be punished by a fine of fifty dollars and for each subsequent offense shall be punished by a fine of one hundred dollars. Notwithstanding the provisions of the first sentence of this section, on any city or town way which is not under jurisdiction of the department, the chief of police of a city or town may issue a permit to

nonprofit organizations to solicit on said ways in conformity with the rules and regulations established by the police department of said city or town."

[7] See, e.g., McCraw v. Oklahoma City, 973 F.3d 1057, 1066 (10th Cir. 2020) (gathering cases and concluding that "begging" is form of protected speech); Rodgers v. Bryant, 942 F.3d 451, 456 (8th Cir. 2019) ("[A]sking for charity or gifts, whether on the street or door to door, is protected First Amendment speech" [quotation and citation omitted]); Reynolds v. Middleton, 779 F.3d 222, 225 (4th Cir. 2015) ("There is no question that panhandling and solicitation of charitable contributions are protected speech"); Speet v. Schuette, 726 F.3d 867, 878 (6th Cir. 2013) (holding that "begging, or the soliciting of alms, is a form of solicitation that the First Amendment protects"); Smith v. Fort Lauderdale, 177 F.3d 954, 956 (11th Cir.), cert. denied, 528 U.S. 966 (1999) ("Like other charitable solicitation, begging is speech entitled to First Amendment protection"); Loper v. New York City Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993) ("Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. Even without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance").

[8] The plaintiffs assert that G. L. c 85, § 17A, discriminates not only on the basis of content, but also on the basis of viewpoint. We need not reach this issue because, under Reed, a regulation is content based, and thus subject to strict scrutiny, if it "singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter," Reed v. Gilbert, 576 U.S. 155, 169 (2015), and as discussed infra, § 17A cannot withstand the strict scrutiny applicable to such content-based regulations.

[9] At oral argument, and in a subsequently proffered surreply brief, the district attorney argued that if the provision concerning the "soliciting [of] any alms" were removed from the statute, it would be a regulation of purely commercial speech subject to intermediate scrutiny. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 562-566 (1980). In our discussion of remedy, infra, we reject the contention that G. L. c 85, § 17A, can be saved by severing, or selectively invalidating, the quoted language. Thus, we do not reach the issue whether regulations directed at purely commercial speech, which are content based by definition, are subject to strict or intermediate scrutiny after Reed. See International Outdoor, Inc. v. Troy, 974 F.3d 690, 704-705 (6th Cir. 2020) (discussing, and distinguishing, cases from United States Courts of Appeals for Second, Third, Ninth, and Tenth Circuits applying intermediate scrutiny to regulations of purely commercial speech post-Reed). The "diversity of approaches" taken by the justices in the United States Supreme Court's recent, fractured opinion in Barr v. American Ass'n of Political Consultants, Inc., 140 S. Ct. 2335 (2020), concerning the constitutionality of the Federal ban on "robocalls," illustrates that the law

in this area is "far from settled." Id. at 2361 (Breyer, J., concurring in the judgment with respect to severability and dissenting in part).

[10] After oral argument, the district attorney moved for leave to file a surreply brief. In it, he argues, among other things, that the plaintiffs waived any arguments regarding facial "overbreadth" by failing to raise them until their reply brief. We reject the contention that the plaintiffs waived their overbreadth arguments, as their principal brief makes clear that they are bringing a facial challenge based on theories of both over- and underinclusiveness. The relevance of overbreadth principles to these claims is addressed in our discussion of remedy, infra.

[11] As a preliminary matter, we reject any assertion that we should consider the exercise of discretion by law enforcement when assessing the facial validity of a statute. See United States v. Stevens, 559 U.S. 460, 480 (2010) (where facial challenge under First Amendment is concerned, "[t]he Government's assurance that it will apply [the statute] far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading").

[12] In his proffered surreply brief, the district attorney argues that "the overbreadth doctrine does not apply when the portion of the statute asserted to be overbroad regulates commercial speech." The district attorney cites our opinion in Bulldog Investors Gen. Partnership v. Secretary of the Commonwealth, 460 Mass. 647, 677 (2011), cert. denied, 566 U.S. 987 (2012), in support of the proposition that "a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground -- our reasoning being that commercial speech is more hardy, less likely to be 'chilled,' and not in need of surrogate litigators." Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 481 (1989). But this ignores that we also are concerned here with the chilling effect of the statute on fully protected, noncommercial speech, not just commercial speech. See Bulldog Investors Gen. Partnership, supra ("this limitation [on the overbreadth doctrine] is only relevant in cases where the speech restricted by the overbroad application is itself commercial speech; an overbreadth challenge may be raised by a commercial speaker claiming, as here, that a regulation unconstitutionally restricts noncommercial speech").

[13] See St. 1990, c. 117 (amending G. L. c. 85, § 17A, "to immediately authorize charitable organizations to solicit donations on public ways"); St. 1978, c. 21 (amending statute to allow sellers of merchandise other than newspapers to obtain permits to avoid prosecution under § 17A); St. 1931, c. 273 (amending statute to create exception for sale of newspapers, although also broadening its reach to include all public ways).